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No. 00-733

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD NICHOLAS, *et alia*,
Petitioners,

v.

SAUL STONE & COMPANY, LLC, *et alia*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, ROSENTHAL COLLINS GROUP, L.P., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD GRANT A PETITION FOR WRIT OF CERTIORARI WHERE PETITIONERS REQUEST, FOR THE FIRST TIME, THAT THIS COURT CREATE A PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF THE NATIONAL FUTURES ASSOCIATION BYLAW 1101.

II. WHETHER THIS COURT SHOULD GRANT A PETITION FOR WRIT OF CERTIORARI WHERE PETITIONERS HAVE FAILED TO SHOW THAT THE COURT OF APPEALS:

A. HAS ENTERED A DECISION IN CONFLICT WITH ANOTHER U.S COURT OF APPEALS, OR

B. HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Peltz v. SHB Commodities, Inc.
115 F. 3d 1082 (2d Cir.1997) 3

In re Lake States Commodities, Inc.,
936 F. Supp. 1461 (N.D. Ill. 1996) 3

Cort v. Ash,
422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed 2d 26 (1975).....4

PRELIMINARY STATEMENT

Respondent, Rosenthal Collins Group, L.P. ("RCG"), respectfully submits this brief in opposition to the Petition for Writ of Certiorari.

Petitioners present to the Supreme Court two questions regarding the interpretation of the National Futures Association's ("NFA") Bylaw 1101. Petitioners then present three arguments in support of their positions regarding the two questions presented. It is difficult to determine which of the three arguments support which of the two questions presented.

By the first question presented, Petitioners seek to create a private right of action under the Commodities Exchange Act ("CEA") for alleged violation of Section 1101. Respondent, RCG is a member of the NFA as a registered futures commission merchant ("FCM"). Petitioners allege that RCG violated Bylaw 1101 and now seeks to bring an action against RCG based on that violation.

By the second question presented, Petitioners seek to have Bylaw 1101 determined to be an intended requirement of the CEA. As a member FCM has no authority to render an NFA Bylaw as a CEA requirement, Respondent RCG will not address the second question presented nor any arguments in support thereof.

SUMMARY OF ARGUMENT

This Court should not grant a petition for writ of certiorari where Petitioners request, for the first time, that this Court create a private cause of action for violations of the National Futures Association Bylaw 1101. Petitioners did not allege such a claim in either their complaint or their amended complaint. They did not raise it at any proceeding before the District Court or the Court of Appeals below. They should not be allowed to raise the issue at this point.

Furthermore, this Court should not grant a Petition for Writ of Certiorari where Petitioners have failed to show that the Court of Appeals: (a) has entered a decision in conflict with another U.S. Court of Appeals or (b) has decided an important question of federal law that has not been, but should be, settled by this court. There is no conflict between the Circuits regarding a private right of action under Bylaw 1101. The question of whether a private right of action under Bylaw 1101 is not an important question of federal law, where §25 of the CEA creates exclusive remedies for violations of the act.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT A PETITION FOR WRIT OF CERTIORARI WHERE PETITIONERS REQUEST, FOR THE FIRST TIME, THAT THIS COURT CREATE A PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF THE NATIONAL FUTURES ASSOCIATION BYLAW 1101.

Petitioners, in their complaints before the District Court, did not allege a violation by any Respondent of NFA Bylaw 1101. Instead Count 2 of the complaint and amended complaint alleged a breach of contract between the FCM Respondents and Respondent, NFA. Petitioners sought relief from the District Court as third party beneficiaries of the contract between the FCM Respondents and the NFA.

The District Court found that "there is simply no indication in the instant case that plaintiffs were the intended beneficiaries of the contractual relationship between the NFA and its FCM members" P.A. 66a. The District Court stated that because there was "no indication that the NFA and its members intended to bestow *contractual rights* on the public under the NFA Manual and Bylaws ... Count 2 of Plaintiffs' Amended Complaint *alleging breach of contract* will be dismissed." (Emphasis added) P.A. 67a-68a.

The Court of Appeals did not discuss Petitioners' claims under Count 2. Instead, they found that the claims including "breach of contract" were discussed by the District Court and found the discussion "cogent and persuasive" and therefore adopted the District Court conclusions with respect to those issues. P.A. 29a-30a.

Before this Court, Petitioners have abandoned their breach of contract claim involving NFA Bylaw 1101 and instead have proposed, for the very first time, a private right

of action under the rule. Neither the complaint nor the amended complaint alleges a right of action under Bylaw 1101. Petitioners did not raise this issue at any point during the proceedings before the District Court. They did not raise this issue before the Court of Appeals. This issue has not been raised nor developed at any point until the Petition for Writ of Certiorari. This Court should not grant certiorari to any issue raised for the first time in a petition for a writ.

II. THIS COURT SHOULD NOT GRANT A PETITION FOR WRIT OF CERTIORARI WHERE PETITIONERS HAVE FAILED TO SHOW THAT THE COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH ANOTHER U.S. COURT OF APPEALS.

Petitioners claim that the courts are divided on the right of a private investor to pursue a cause of action for a violation of Bylaw 1101. P.A. 13. Petitioners cite *Peltz v. SHB Commodities, Inc.* 115 F. 3d 1082 (2d Cir. 1997) as a case in opposition to the lower Court of Appeals in this case. However, the *Peltz* court does not address Bylaw 1101. The plaintiff in *Peltz* had been involved in a scheme to defraud the markets, which failed and caused a debit in his account at defendant, FCM. Plaintiff charged that defendant had not properly secured the authorization for the trading in his account under 17 C.F.R. § 166.2. The *Peltz* court found that the defendant had complied with the regulation and affirmed the trial courts decision for defendant. At no time, did the plaintiff raise a right of action under Bylaw 1101, nor did the *Peltz* court address the issue. Therefore, the *Peltz* decision is not in conflict with the lower Court of Appeals' decision.

Petitioners accurately state that the District Court for the Northern District of Illinois, Eastern Division declined to imply a private right of action for violations of Bylaw 1101

in *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461 (N.D. Ill. 1996). P.A. 14. This citation, however, does not support their position that the U.S. Courts of Appeals are in conflict regarding a private right of action under Bylaw 1101.

Finally, Petitioners state that there is a conflict between the regulatory bodies, *i.e.* NFA and CFTC, and the courts. P.A. 15. This bald statement seems incongruous to Petitioners' instant claim against the NFA for failure to recognize a private right of action for the violation of Rule 1101. Certainly, the NFA is not in conflict with the lower courts' decisions. Respondent is at a loss to explain this apparent contradiction.

Petitioners have failed to demonstrate that the 3rd Circuit's decision is in conflict with another Court of Appeals. For this reason, their petition should be denied.

III. THIS COURT SHOULD NOT GRANT A PETITION FOR WRIT OF CERTIORARI WHERE PETITIONERS HAVE FAILED TO SHOW THAT THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioners have not specifically cited Supreme Court Rule 10(c) as a basis for its Petition for Writ of Certiorari. However, it is the only basis that can be inferred from their arguments entitled I.B.2. and I.C.

Argument I.B.2. states that Bylaw 1101 is a specific rule for the protection of the public. P.A. 18. In support of this argument, Petitioner cites *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed 2d 26 (1975). Petitioners correctly state

that the *Cort* decision "sets forth four factors to be considered when determining the existence of a private right of action under a federal statute which does not provide for one." P.A. 19. The *Cort* decision set forth several relevant factors to determine whether a private remedy is implicit in a statute not expressly providing one. The CEA, from which Petitioners seek relief, does, however, expressly provide public remedies.

Petitioners entreat this Court to "revisit" the *Cort* decision. P.A. 20. The reason for this revisit is to provide the public benefit of preventing fraud. Certainly, a worthy reason that could be an important federal question to be decided by this Court, if it were not for the private rights of action section already in place in §25 of the CEA.

Sections 25(a) and 25(b) of the CEA provide the "exclusive remed [ies]" for violations of the CEA. Section 25(a)(2) states:

> "Except as provided in subsection (b) of this section, the rights of action authorized by this subsection and by sections 7a(11), 18, and 21 (b)(10) of this title shall be the *exclusive remedies* under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration." (Emphasis Added.)

Section 25(b) 5 states:

> "The rights of action authorized by this subsection shall be the *exclusive remedy* under this chapter available to any person who sustains a loss as a result of (A) the alleged failure by a contract market, licensed

> board of trade, clearing organization, or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this chapter, or any Commission rule, regulation, or order." (Emphasis Added.)

Again, Petitioners cite authority that does not support their position. Section 25 clearly provides for exclusive rights of action. Therefore, this Court should not carve out another right of action from the CEA by way of Bylaw 1101.

Finally, Petitioners argue that this Court needs to recognize a private right of action under Bylaw 1101 to protect the public from Ponzi schemes and types of other commodity fraud. P.A. 10, 21.This last-ditch effort to dress up their argument as an important question of federal law also fails.

Petitioners state in their Factual Background that the Ponzi scheme at issue was designed and executed by one Charles Kohli and Ram Chandran. P.A. 7. Kohli plead guilty to federal charges of commodities fraud, wire fraud and income tax evasion. P.A. 40a. Chandran is under investigation by the United States Attorney's Office. P.A. 41a. Clearly, the designers and executors of the scheme perpetrated against Petitioners have been brought to justice. To seek civil remedies for their injuries, Petitioners need only look to §25 of the CEA. Petitioners have failed to show how the public needs an additional right of action to protect it from Ponzi schemes and other commodity fraud.

CONCLUSION

Petitioners request, for the first time, that this Court create a private cause of action for violations of the National Futures Association Bylaw 1101. However, they have failed to present any special and important reason to compel review by this Court.

Furthermore, Petitioners have failed to articulate a proper question for this Court to consider under Supreme Court Rule 10. Petitioners have failed to show that the Court of Appeals has (a) entered a decision in conflict with another U.S Court of Appeals or (b) has decided an important question of federal law that has not been, but should be, settled by this Court.

Accordingly, for all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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